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BRIEF AND APPENDIX FOR APPELLEES

Supreme Court of the United States

OCTOBER TERM, 1948

No. 297

JOHN M. DANIEL, AS ATTORNEY GENERAL OF SOUTH CAROLINA, L. GEORGE BENJAMIN, AS INSURANCE COMMISSIONER OF SOUTH CAROLINA, AND B. B. BROCKMAN, AS SHERIFF OF SPARTANBURG COUNTY, APPELLANTS,

versus

FAMILY SECURITY LIFE INSURANCE COMPANY, J. GORDON FLOYD, W. RUSSELL FLOYD AND WILLIAM E. LANFORD, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF SOUTH CAROLINA

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This appeal is from the judgment of a three-judge District Court for the Eastern District of South Carolina, permanently enjoining the Attorney General and the Insurance Commissioner of that State and the Sheriff of one of its Counties (and, by representation, their subordinates) from enforcing the provisions of Act. No. 787 of the South Carolina General Assembly of 1948 (45 Stat. 1947), which is set out in full in Appendix A to the majority opinion below.

OPINIONS BELOW

The opinions below are reported in 79 F. Supp. 62. We call attention to the fact that the majority opinion is by

the District Judges of the Western District of South Carolina, and the Eastern and Western Districts.

JURISDICTION

Federal Jurisdiction was invoked by the appellees, and the judgment appealed from is that of a three-Judge District Court, convened under 28 U.S.C.A. 380 and Section 266 of the Judicial Code. (New U. S. 28, 1253 and 2284), invalidating the Act assailed as offending the due process and equal protection clauses of the Fourteenth Amendment to the Federal Constitution.

THE STATUTE ASSAILED

Since Appellants' statement of the "*question presented*" describes a statute and attributes an effect widely variant from the features and effect of the statute assailed, we reproduce it here, with the portions we complained of italicised, in aid of an early and clear emergence of the questions involved, as we contend.

"Section 1. It shall be unlawful for any life insurance company, corporation or association, except fraternal benefit societies licensed to do business in this State to own, manage, supervise, or operate or maintain a mortuary or undertaking establishment, *or to permit its officers, agents, or employees to own, operate or maintain any such funeral or undertaking business.*

Section 2. It shall be unlawful for any life insurance company, sick or funeral benefit company, or any company, corporation or association engaged in a similar business to contract or agree with any funeral director, undertaker or mortuary to the effect that such funeral director, undertaker or mortuary shall conduct the funeral of any person insured by such company, corporation or association.

Section 3. *It shall be unlawful for any funeral director, undertaker, or mortuary, or any agent, officer or employee thereof to be licensed as agent, solicitor or salesman for any life insurance company, corporation or association doing business in this State.*

Section 4. Any person violating any of the provisions of this Act shall be deemed guilty of a misdemeanor, and each violation thereof shall be a separate offense, and upon conviction shall be punished by fine not exceeding One Thousand ($1,000.00) Dollars or by imprisonment at hard labor for not exceeding six (6) months, or both, such fine and imprisonment within the discretion of the Courts."

The prohibitions complained of are:

1. It denies to any undertaker the right to be an officer, agent, or employee of *any* life insurance company.

2. It denies to *all* agents or employees of an undertaker the right to be licensed to sell life insurance, without reference to his qualifications.

QUESTIONS INVOLVED

Does this statute offend the due process and equal protection clauses of the 14th Amendment of the Federal Constitution:

(a) Because it employs descriptions which limit and direct its effect with premeditated precision to the destruction of the plaintiff Life Insurance Co., with no reasonable relationship between the destruction intended to be accomplished and any public evil to be prevented.

(b) Because it denies that Company the right enjoyed by all other corporations to select its officers on consideration of business success, experience, public standing, executive ability, etc., with no reasonable relationship between the prohibitions inflicted and any public evil to be prevented.

(c) Because it denies to undertakers and *all* their agents or *employees* the right to be life insurance agents, notwithstanding they have been adjudged by the proper State Authority, after prescribed examination, fit, competent and trustworthy to be such and duly licensed and re-licensed as such, with no discernible relationship between the mass disqualification and any evil to be remedied;

(d) Because, under the undisputed, full and clear factual proof in this record of the social and economic benefits accruing to the low-income and wage-earning classes from the policies, rates and surrender and extended insurance values, and its method of doing business, and the equally full, clear and undisputed proof that its policies and plan supply a longstanding legitimate and widespread public need and demand not met by competing companies, is not its proscription the prevention of a public benefit to those classes who most need it;

(e) Because, in view of the recently enacted "Insurance Code of South Carolina" and the completeness with which it covers the insurance business in all its aspects, and the plenary power and mandatory duty conferred upon and vested in the Insurance Commissioner to correct and prevent abuses and all unfair methods or deceptive acts and practices and to revoke or suspend company licenses and the licenses of agents, it is not a reasonable regulation, but a forbidden proscription of the company, undertakers and agents and employees of undertakers.

STATUTES INVOLVED

In addition to the statute under attack, the following South Carolina Statutes bear on the case:

1. An Act adopted in 1929 (36 Stat., 234) forbidding insurance companies to pay or settle policies in merchandise or services rendered or agreed to be rendered, or to issue any policy so providing, which is carried forward in

the South Carolina Codes of 1932 and 1942 as Section 7984, and as Section 65 of Article 1 of South Carolina's new Insurance Code of 1947 (45 Stat. 350).

2. The following sections of South Carolina's 1947 Insurance Code (45 Stat. 322-473), stated in substance:

Section 4, Article 1, Establishing the Insurance Department and charging it with the enforcement of all insurance laws.

Section 5, Making the Insurance Commissioner chief officer of the Department.

Sections 7, 8, and 9, Providing for a Deputy Commissioner, Chief Actuary, and "other deputies, actuaries, examiners, clerks, and other employees as may be found necessary for the work of the Department."

Section 11, Requiring the Insurance Commissioner to license all insurance companies and collect the license fees.

Section 12, Prescribing the powers and duties of the Commissioner as follows: (1) to see that all laws governing insurance companies are faithfully executed, and "to that end, he shall have power and authority to make rules and regulations . . . to enforce, carry out, and make effective the provisions of this Chapter"; (2) furnish blanks for statements required to be reported to him, "which may be changed by him from time to time when necessary to secure full information as to the standing, condition, and such other information desired of said Companies"; (3) institute and prosecute criminal violations of insurance laws, and report any such violations to the Attorney General.

Section 13, Providing: "It shall be unlawful for the Secretary of State to *issue any charter to any Insurance company of whatever kind*, or permit any foreign insurance company to do business within this State *without the written approval of the Commissioner.*" (See Appendix).

Sections 16, 17, 18, and 19, Providing for the examination of companies, prescribing the notices to be given, make orders and decisions, and providing for Court review of such, conferring upon the Commissioner and his Deputies and Assistant Deputies the power to summons and compel the attendance of witnesses, and giving the Commissioner "the power of a Circuit Judge to punish for contempt any witness failing to answer any summons, or failing or refusing to testify when so required," and the power to enter premises.

Section 24, Making the Commissioner's certificate admissible evidence that any insurance company or any agent has been licensed by the Department.

Section 25 provides, *inter alia*, ". . . the Commissioner shall, from time to time, report to the General Assembly any change which in his opinion should be made in the laws relating to insurance."

Section 26, Providing: "Every Insurance Company doing business in this State shall be licensed and supervised by the Commissioner."

Section 28, Requiring that the Commissioner shall be satisfied by examination and evidence that any Company applying for a license is duly qualified under South Carolina law, and to examine the affairs of every domestic insurance company thoroughly at least as often as once in three years, "especially as to its financial condition, and whether it has complied with the laws."

Section 31, Requiring the filing by the President of any insurance company of an oath that the company has not violated any of the laws within the past twelve months and it accepts the obligations of the Insurance Law before the Commissioner may license it.

Section 33, Requiring the Commissioner before granting a license, to determine that the Company's reserves are adequate for the protection of policyholders, and "in

case of a company organized under the laws of this State, the Commissioner shall determine that the reserve basis to be used by such Company will be adequate."

Section 38, Requiring every Insurance Company to file before March 1st each year a statement, under oath, showing the business standing and financial condition of the Company on December 31st preceding.

Section 42, Providing a penalty for a false statement in any annual or other statement of any insurance company.

Section 65, Forbidding settlement or payment of death benefits in merchandise or services. (See our Appendix.)

Section 69, Empowering the Commissioner to revoke the license of any company if in his opinion, it is in an unsound condition, or has failed to comply with the law or its Charter. (See Appendix.)

Section 86, Penalizing the failure of an insurance agent to exhibit his license on demand of any whom he may solicit for insurance.

Section 101, Making it unlawful for any insurance company to issue or sell any policy, contract, or certificate "*until the forms of the same have been filed with and approved by the Commissioner.*"

Section 107, Requiring each applicant for an agent's license to stand an examination as prescribed by the Commissioner to develop his qualifications, knowledge of insurance laws of this State, his experience, whether he ever had a license suspended or revoked or refused, whether he has ever been in default on indebtedness to any insurance company, or ever had an agency contract cancelled, and a complete history of the applicant's employment for three years preceding the date of application, and that "*before issuing such license, the Commissioner shall determine from the examination that the applicant for an agent's license is a competent and trust-*

worthy person to engage in the classification of insurance business he intends to engage in. The Commissioner shall have power to revoke said license after ten days' notice, or refuse to re-issue said license when it shall appear that an agent has violated the laws of this State, or has wilfully deceived or dealt unjustly with the citizens of this State." (See Appendix.)

Article 2 deals with fire insurance companies; Article 3 with fraternal benefit associations; Article 4 with reciprocal insurance; Article 5 with domestic mutual insurance; Article 6 with Mutual Benevolent Aid Societies; Article 7 with non-profit hospital service plan; Article 8 with Sureties and Surety Companies; Article 9 with Health and Accident Insurance; Article 10 with Marine insurance; Article 11 with Casualty and Surety rates.)

Article 12 (45 Stat. 463) is captioned: "Unfair Methods of Competition, and Unfair and Deceptive Acts and Practices in the Business of Insurance." Section 1 declares the purpose, Section 2 gives definitions, Section 3 forbids unfair methods of competition, and Section 4 defines what are deemed unfair methods of competition, and unfair and deceptive acts or practices. (See Appendix.)

Sections 5, 6, and 7, of Article 12 empower the Commissioner to examine and investigate every person engaged in insurance to determine whether he has been or is engaged in such unfair methods or practices; to serve charges upon such as he has reason to believe are or have been so engaged with a notice of the time and place fixed for a hearing to receive evidence, subpoena witnesses, require production of documents, make a stenographic record of the proceedings, issue cease and desist orders where any such method or practice has been found.

Section 8 provides for judicial review, and that to the extent the Commissioner's order is affirmed, the Court shall issue its order commanding obedience.

Section 9 prescribes procedure when the Commissioner has reason to believe there is any method of competition or any act or practice in the insurance business which is unfair or deceptive, other than those defined in Section 4.

Section 2 of Article IX of the South Carolina Constitution provides: "No Charter of Incorporation shall be granted, changed or amended by special law . . ., but the General Assembly shall provide by general laws for changing or amending existing charters, and for the organization of all corporation hereafter to be created . . . all charters now existing or hereafter created, shall be subject to future repeal or alteration."

STATEMENT

This action was brought in the United States District Court for the Eastern District of South Carolina by the Family Security Life Insurance Company, a legal reserve life insurance company created by the law of South Carolina and licensed by its Insurance Department to engage in the life insurance business, and J. Gordon Floyd, W. Russell Floyd, and William P. Lanford, as agents of that Company, in behalf of themselves and all other duly licensed agents of the company who were directly or indirectly connected with, or interested in the undertaking business, to enjoin the enforcement of the Act hereinabove set forth. The two Floyds and Lanford are directors of the Company, and J. Gordon Floyd is its President.

W. Russell Floyd and J. Gordon Floyd own in equal shares the entire capital stock of the J. F. Floyd Mortuary, Inc., an undertaking establishment which has been conducted in Spartanburg for the past 62 years by the Floyd family. It owns $26,000.00 of the capital and surplus of Family Security Life Insurance Co.

J. Gordon Floyd and W. P. Lanford are agents of the Family Security Life Insurance Company, duly licensed by the Insurance Commissioner, and Lanford is an own-

ing partner in the Lanford-Boyter Mortuary in Woodruff, Spartanburg County, S. C. Before becoming an agent of the plaintiff company, he was, in April, 1947, licensed as an agent for the Equitable Life Assurance Society of the United States, and, in July, 1947, as agent to write health, accident and hospital insurance providing death benefits in cases of accidental death, for the North American Assurance Society of Virginia, *and devoting only part time to writing insurance, realized substantial commissions augmenting his income from the mortuary business.* (R. 63, 64.)

At the commencement of this action, the plaintiff insurance company had 34 stockholders, all but one being interested in the undertaking business. It had 79 agents licensed by the Insurance Commissioner, and re-licensed as of April 1, 1948, 51 of whom were connected with the undertaking business as owner, agent or employee. (R. 15, 16.) It has an authorized capital of $50,000.00, a subscribed capital of $25,000.00, paid-in capital of $16,000.00, and paid-in surplus of $64,000.00. (R. 15.) Three of its five directors and a majority of its younger agents are veterans of World War II. (R. 72, 73.)

About 1940, J. Gordon Floyd began to study writing legal reserve life insurance through funeral directors and mortuaries. Being convinced from this study that there was a public need and demand for insurance so written, and that it was sound from the standpoint of the public and the undertakers he acquired the plaintiff company in 1941. When World War II began, he volunteered as a private and remained in service for approximately four years, during which his plan was dormant. Upon his discharge, he renewed his study and interested other undertakers in the plan. (R. 11.)

Though annually re-licensed since 1941, its expansion did not begin until after Mr. Floyd's discharge from the military service. (R. 11.)

Its 33 stockholders who are interested in undertaking establishments are located in 17 different counties of South Carolina, and in 25 different cities and towns. (R. 68, 69.)

Seeking the further expansion of the Family Security Life Insurance Company, J. Gordon Floyd, past President of the South Carolina Association of Funeral Directors (about 130 in number), knowing them all, went to call on practically all of them with Mr. Honig, the Vice-President, and offered to each and all the right to become stockholders in and agents for the Company, taking as little stock as they desired at Five Dollars per share, nothing being added to the cost on account of expenditures in developing the plan, or because of prospective earnings. (R. 66.)

The by-laws of the Company provide: (R. 66, 67):

Section 1. Objectives. *The objectives of the company are those of providing the people of South Carolina with a sound, economical, attractive plan and method for prepaying funeral expenses, through the mechanics of life insurance, and providing a permanent protection against the operation of burial rackets in the State of South Carolina.*

Section 2. Method of Operation. The company shall offer its insurance through South Carolina Funeral Homes and Funeral Directors who own stock in the company and serve as its exclusive agencies and principal agents, respectively.

Section 3. Payments in Cash. All policies offered by the Company shall be on a life insurance basis with legal reserves and non-forfeiture values approved by the South Carolina Insurance Commissioner, and claims paid on the company's policies of insurance shall be made in cash and shall permit the payee complete freedom of choice in selection of funeral home and in selection of type and cost of merchandise and services.

Section 4. Restriction on Activities. The company at no time will enter the funeral business, nor will it, at any time or under any circumstances, own or lend money on stock, real estate, equipment, paraphernalia, rolling stock, merchandise or any other assets owned or used by any funeral home in the conduct of its funeral business.

Section 5. Restriction on Stock Ownership. No one funeral home may own more than forty-nine per cent of the company's outstanding stock.

Before soliciting other undertakers to take stock and agencies, Mr. Floyd was thoroughly convinced of the soundness of the plan, and the public need and demand, not through his own study and investigation alone, but from the report of Mr. Honig whom he had employed to study the plan and investigate its workings in other States, who, after more than eight months in such observation and study of similar plans in other States (*in 25 of which life insurance was being written by funeral directors*), (R. 11, 51, 55), reported that companies similar to the Family Security Life Insurance Company which had met (as it does) the requirements of industrial insurance companies, supplied a widely prevalent public need and public demand among the low income and wage-earning groups because: (a) The public regard their local funeral director as more permanent and dependable than the average industrial insurance company, which they know only through the weekly visits of the debit collector, who is constantly being changed, and because of the very high "lapse ratio common to weekly industrial life insurance. (*During 1946 South Carolina industrial life insurance companies issued $201 million dollars in new insurance, and lapsed $126 million dollars*)." (R. 55); (b) funeral homes are usually among the oldest and longest established businesses in a community, and have earned the confidence of these classes, (R. 56), who think it logical to insure against burial ex-

penses with their funeral director; (c) this effort to prepay burial expenses is manifested by the insistence of many of the poorer people on depositing burial expense money with their undertaker. This operates to their disadvantage because the undertaker is not equipped to invest the deposits, whereas, the mechanics of industrial insurance meets the need at materially lesser expense. (R. 56); (d) people of substantial means carrying large insurance frequently take out a smaller policy through the funeral director earmarked for funeral expenses, to guard against overspending under the stress of recent bereavement. (R. 56.)

In October, 1947, an actuary was employed to develop policy contracts, non-forfeiture values and premium rates. (R. 57.) Submission of the contracts for the approval of the Insurance Commissioner was delayed pending his decision whether or not he would require the inclusion of the recommendations of the Guertin Reports in all industrial life policies. (R. 57-58); but no decision being made, notwithstanding the absence of any requirement of South Carolina law or any regulation of the Insurance Department, the Family Security Life Insurance Company adopted those features of the Guertin Recommendations which are most to the advantage of the policyholder with the result that it is compelled to maintain larger reserves, and to pay greater surrender values than competing industrial life companies. (R. 58.)

The Insurance Commissioner and his Chief Actuary, after full discussion, on December 4, 1947, approved the plan and methods of Family Security Life Insurance Company, saying that it was the most practical solution to the problem created by the writing of burial insurance by North Carolina Associations "over the line,"—an abuse that he could not prevent because it would always be claimed that the policy was written in North Carolina, and that a South Carolina Company like Family Security,

owned and operated by South Carolina undertakers was the answer (R. 58, also 49-50). He then licensed 41 funeral directors or employees of funeral directors as agents and re-licensed them with 17 others for the fiscal year ending March 31, 1949. (R. 58.)

The Chief Actuary of the Department questioned the proposal of the Family Security Life Insurance Company to issue policies insuring through age 74, explaining that competing companies did not insure above age 65, and "*should your company issue at advanced ages, I am very sure that competing companies will feel that they should also offer the same protection*" (R. 15-59). He yielded to the Company's argument that mortality tables are available to age 103 and a Georgia Company insured to age 90, and its experience was satisfactory. (R. 59.)

In February, 1948, the Insurance Department approved the policy, surrender values, extended insurance, nonforfeiture value, guaranteed interest rate, mortality tables, and reserve valuation method of the Company. (R. 59.)

This was after the challenged statute was introduced in the South Carolina House of Representatives on February 3, 1948. (R. 45.)

The Family Security Life Insurance Company is the only South Carolina Company writing industrial insurance to age 74. (R. 15-59.)

When the new Insurance Code of 1947 was under consideration by the General Assembly in 1945, J. Gordon Floyd was instrumental in obtaining the retention of the prohibition against paying policies in merchandise or services, and its incorporation as Section 65 of the Insurance Code. (R. 46.)

The Family Security Life Insurance Company is the only South Carolina industrial life insurance company adopting the recommendations of the Guertin Committee

of the National Insurance Commissioners' Association favoring the policy holders as follows: (R. 14):

(a) It employs the 1941 Standard Industrial Mortality Table, the most recent available, and which reflects mortality gains resulting from improved living conditions and medical science and discoveries, in lieu of the "American Experience Mortality Table," unrevised since 1870, and used by all other South Carolina industrial life insurance companies (R. 149, 153; also Guertin Reports, page 9). The later mortality table was adopted by a committee appointed by the National Association of Insurance Commissioners, and composed of the Actuaries of the Insurance Departments of five different states, and one each from the Actuarial Society of America, and the American Institute of Actuaries, to correct and remedy what the President of the Association, in appointing the Committee, described as "*the apparently enormous profits accruing to insurance companies from the so-called 'gain from mortality*". (R. 153, and the Guertin Reports, page 9).

(b) The Commissioners' valuation method for determining policyholders' reserves, and non-forfeiture values. (R. 14), which, according to the report "was deemed in the public interest because of its encouragement to strengthening of reserve bases in accordance with modern tables of mortality, lower rates of interest, and more conservative methods of calculation." (R. 153.)

(c) An assumed interest rate within the Company's earning capacity based on current market and investment conditions. (R. 14.)

The Family Security Life Insurance Company meets a wide-spread public need and public demand. No more conclusive demonstration of this statement could be made than that reflected by the tabulation of business volume growth found in the Stipulation on page 45 of the Record.

On February 3, 1948, when the Act intended to destroy it was introduced, there were only two policies with insurance in the aggregate amount of $500.00. On March

27, 1948, there were 481 policies with $156,750.00 of insurance, and on May 8, 1948, (ten days before the trial below), there were 2,824 policies with $838,375.00 of insurance in force.

And this growth was achieved in the face of the legislation intended to destroy the Company, and the radio and newspaper publicity given to this lawsuit, as well as the misrepresentations of agents of competing companies. (R. 64, 65.)

At the time of the trial below, only two policies issued by the Family Security Life Insurance Company had matured in death claims. Both were written by undertaker-agents. In one case the undertaker-agent who wrote the policy was chosen to bury the insured. In the other case an undertaker competing with the undertaker-agent who wrote the policy got the funeral. (R. 43.)

The Family Security Life Insurance Company is chartered and licensed to write only "Industrial Life Insurance," which signifies in insurance terminology policies of $1,000.00 or less with premiums payable weekly, bi-weekly or monthly, which are most often collected by debit walkers calling at the homes of the policyholders. (page 95, Guertin Reports). The maximum policy it can write under the contracts approved by the Insurance Department is $750.00, and at the time of trial, the average policy was $299.00. (R. 60.) The published statistics of the National Funeral Directors Association show $365.00 as the average cost of a funeral. (R. 57.) According to the survey of Funeral Service of Chicago, 85% of the people have life insurance while living, and only one out of six have it when they die. (R. 57.)

The policies of Family Security Life Insurance Company are substantially identical with the industrial policies of other companies, except for the favorable features to policyholders adopted from the Guertin Reports, and that no debit collectors are employed, but the premiums

are payable monthly and may be remitted to the agency by mail, or paid in cash at the office of the agency through which the policy is written. (See exhibits 18-A—18-D.) Its premium rates, cash surrender, and extended insurance values are more favorable to the policyholders than the policies of other industrial companies, and it has higher reserves. (R. 14.) Its policies are payable to a designated beneficiary having an insurable interest by relationship. Its policy jackets carry the name of the undertaker agency through which the policy is written, and through which the premiums are to be paid. (R. 37.)

Mr. Albert Orgain, President of the South Carolina Life Underwriters Association, who had written letters and made addresses urging life insurance agents throughout the State to pressure their legislative representatives to enact the Statute assailed, (R. 75 and 76), said at the hearing before the Senate Committee:

> "Gentlemen, the life insurance company men of South Carolina are 100% against the manner in which this Company (Family Security) proposes to write and service life insurance. I will tell you again, as I have told them over there, and as I have admitted before every group that I have spoken to that they have a life insurance company that is organized under the State law, and it *has met every law that is on the books, and they are running on the Commissioner's standard of arriving at rates.*" (R. 128 and 129.)

The Facility of Payment Clause in the policies of Family Security is the same as that employed in policies written by competing Industrial Life Insurance Companies, and follows the "Commissioners' Proposed Industrial Standard Policy Provisions Law" as found on page 277 of McGraw-Hill's "Industrial Life Insurance" which is an authority in the insurance field. "Facility of Payment" clauses are common to all industrial life policies. It may be doubted that the Insurance Commissioner would ap-

prove a policy without it; because of the saving in delay and expense accomplished by it, at a time when (if we may quote a striking commentary) *"every penny has to be counted, lest some that will later be required for food be spent for unnecessary things, with a still unsettled balance at the grocers for food during the last shut down of the mill, and with rumors of dull times and another shutdown coming."*

Those fighting the Family Security Life Insurance Company and its methods admit that it *"is a legal reserve life insurance company meeting all of the laws,"* and that the only objection they have is the method of writing through undertakers and employees of undertakers. (R. 70, and 128 and 129.).

(Mr. Orgain, President of South Carolina Life Underwriters, said before the Senate Committee (R. 128):

> "I am the man that made a speech in Union . . . I said this (the Statute assailed) would affect approximately 4,200 life insurance men in the State of South Carolina . . . and I have made some 12 or 14 addresses over this State in the last three or four weeks. The life insurance men of the United States and South Carolina and every community . . . organized themselves together in a professional organization . . . as closely allied, as closely akin to the American Medical Association or the American Bar Association as we can possibly get," and further (R. 129) that he had served his company in Alabama and Louisiana, and "these gentlemen (Floyd and Honig) are not proposing to do business as has been done in those two states, because they have put in a clause in their policy which says 'we will pay in cash' ", and that (R. 131) he had never heard of any abuse, cheating or defrauding, or other complaint of any policyholder under the operation of this Company's plan.

When Mr. McDougald was asked to take stock and become an agent, his objection was that the plan would pre-

vent his selling funerals "*at as high a price range as he was presently obtaining.*" (R. 67.) Mr. Wood declined because "*it would permit a newcomer in the undertaking business to write a sufficient number of policies to enable him to stay in business.*" (R. 67.) Mr. Wolfe said that if the law permitted undertakers to write insurance, his establishment would write it, (R. 68), and published an advertisement to that effect, indicating that he would use another company. (R. 74-A.)

The case was tried on the merits, (R. 78, 79, 80), on the pleadings, affidavits and exhibits, with ten days leave to file supplementary material. (R. 81.)

The trial Court made detailed and analytical findings of fact, based on undisputed evidence, uncriticized by the dissenting Judge, and which we cannot match for accuracy, comprehensiveness, compactness, and clarity.

OUTLINE OF ARGUMENT

In urging our contentions on the Court, we concede at once (1) that the insurance business is affected with a public interest, and is subject to reasonable state regulation; (2) that there is a presumption in favor of the validity of a State Statute, and (3) that motives influencing a legislative body or its individual members will not be inquired into as bearing on the legality or validity of the questioned enactment, even though it be indisputably proved that the act was pressured through by a lobby, to serve a special interest.

We shall nevertheless contend that an act, by its language, and by its necessary and limited effect may, on its face, overthrow a presumption of validity, especially where it interferes with lawful business, lawful occupations, and the right of individuals to pursue a lawful calling in a lawful manner, and that this act is on its face invalid as offending the equal protection and due process clauses.

Especially does its arbitrary and oppressive invalidity appear when the descriptive terms employed to limit and direct its effect are considered in their relation to existing laws and measures in *pari materia* (and the comprehensive revision in 1947 of the South Carolina Insurance Law, enacted by the General Assembly identical in personnel with that which passed the act under attack in 1948), and in the light of conditions existing when the 1947 Insurance Code was adopted when the legislative mind was directed over a period of more than two years prior to covering the insurance field.

We will contend that the act is *prima facie* invalid because it disables undertakers and all their agents or employees to sell life insurance, notwithstanding the insurance Department had licensed 51 undertakers or their employees or agents as life insurance agents after making the required examination of each and determining therefrom that they were fit, competent and trustworthy to write the class of insurance indicated in their applications, and that they were re-licensed for the fiscal year beginning April 1, 1948, while the assailed act was under hearing before the legislative committees.

If invalidity does not emerge upon the face of the act, we nevertheless contend that it is invalid because of the undisputed, full, and clear proof of the great benefits to the low income and wage-earning classes afforded by the more favorable mortality tables used, the lower premium rates charged, the greater reserves, the greater surrender and extended insurance values, and the Commissioner's method of computing interest which features the policies and contract of the Family Security Life Insurance Company, and which they can obtain from no other company created under South Carolina law, and the Act, without reason, denies them benefit to them and rebukes the public need and demand supplied by this Company alone.

Further, if it is not invalid on its face, or invalid because of the undisputed and full showing of public benefit and the total absence of any testimony supporting a reasonable inference of any evil to be remedied, does it not stand undisguised as an arbitrary and unwarranted proscription of an honorable class and a particular Company when matched against the South Carolina Insurance Code of 1947, and especially its section 65 which was retained at the instance of the President of this Company, and the other minute and detailed provisions to insure against all imaginable abuses, unfair methods, and deceptions?

Notwithstanding the unconcern of this Court as to motivation of the legislature or its members, nevertheless, the hearings before the Senate Committee are pertinent and admissible, not because they show that the Act was pressured by competing insurance companies, but because of the total absence of any hint or suggestion of any evil that the Act might prevent, and the fact that the Insurance Commissioner was not called in and no Actuary was questioned.

We shall contend, as against the argument of the appellants, that they did not produce the best available evidence in support of their nebulous contentions, but relied on hearsay, failed to call the Insurance Commissioner (who had approved our policies and licensed our agents while the Act was pending in the Legislature). They failed to present any insurance man to furnish a reason for the Act. We have approval of the Insurance Commissioner and his Actuary, and furnish the affidavit of an actuary who is the actuary for a company whose attorney appeared before the Senate Committee on Banking and Insurance. (R. 98.)

We will contend the dissenting opinion reached the conclusion of an existing evil by invoking two inadmissible presumptions, or inverting the permissible presumptions, (1) that it is always presumed that persons intend to com-

ply with the law, and will not commit a criminal act, and (2) that public officers (the Insurance Commissioner and his corps of Deputies, Examiners and Agents) will perform their duties; and that the theory of the argument of the appellants sins against the legitimate presumption that the law will be obeyed and that public officers will do their duty.

The Trial Court's findings of fact are adequately supported by ample and undisputed evidence. The testimony develops no dispute as to any material matter of fact, and the only conflict is in matters of opinion.

These findings will not be disturbed (Rule 53 of Rules of Civil Procedure); *U. S. v. Knott*, 298 U. S. 544; 56 S. Ct. 902; 80 L. Ed. 1321; *Sheldon v. Metro-Goldwyn*, 309 U. S. 390; 60 S. Ct. 681; 84 L. Ed. 825; *Borden's Farm Products v. Ten Eyck*, 297 U. S. 251; 56 S. Ct. 453; 80 L. Ed. 699; *Great Atl., etc. Tea Co. v. Grosjean*, 301 U. S. 412; 57 S. Ct. 772; 81 L. Ed. 1193).

The majority opinion below is by District Judges who are citizens of South Carolina. There is no South Carolina decision construing the Statute assailed. Their construction will be accepted by this Court. *Thompson v. Consolidated Gas*, 300 U. S. 55, 57 S. Ct. 364; 81 L. Ed. 510.

There is no separability clause and the Act was defended as a whole in the Trial Court, and this Court looks to the Trial Court for the original examination of the local question. *Farrington v. Tokushige*, 273 U. S. 284; 47 S. Ct. 406; 71 L. Ed. 646.

ARGUMENT

I.

The Statute is unconstitutional on its face.

"The principle that the State has a broad discretion in classification in the exercise of its power of regulation is constantly recognized by this Court. Still, the Statute

may show on its face that the classification is arbitrary." *Borden Farm Products v. Baldwin*, 293 U. S. 194; 55 S. Ct. 187; 79 L. Ed. 281.

The classification is accomplished by the careful employment of descriptive terms designed, by inclusion and exclusion, to limit and direct its effect solely to the destruction of the Family Security Life Insurance Co.; protect its competitors from that competition; and to disable undertakers and their agents and employees to write life insurance, notwithstanding they have been duly licensed by the Insurance Commissioner, after a mandatory examination and the filing of sworn prescribed forms disclosing their qualification, and after being adjudged "competent and trustworthy" to engage in the branch of insurance business indicated by their application.

"The true principle (of classification) requires more than a mere designation that will serve to identify, for the characteristics which must serve as the basis of classification, must be of such a nature as to mark the object so designated as peculiarly requiring exclusive legislation." *State v. Hammer*, 42 N. J. L. 440.

Equality in right, privileges, burdens and protection is the cardinal thread of intent running through the Constitution, and an Act which intentionally and necessarily creates inequality, based on no reason arising from difference in condition or circumstances is contrary to the Constitution. The Act here transgresses every requirement for permissible classification with complete thoroughness. It imposes disabilities on undertakers and their agents and employees because they pursue a lawful cause in a lawful manner, and are "competent and trustworthy to write life insurance." It does not affect a class of insurance companies, but selects the Family Security Life Insurance Co. for annihilation.

The Act discloses no reasonable basis for the discriminating classification in any way relating to any evil. On

the contrary, its language proclaims its purpose to protect other insurance companies against the competition of the Family Security Life Insurance Co., which is selling policies to the working classes in all respects more favorable than the policies the protected companies are willing to sell. *It prevents no evil. It denies to the working classes a benefit* so plain and material as to provoke the competing insurance companies to run whining to the Legislature.

In *Allgeyer v. Louisiana*, 165 U. S. 578 (589), 17 S. Ct. 427, 41 L. Ed. 832, the Court said:

"The Liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to successful conclusion the purposes above mentioned. It was said by Mr. Justice Bradley, in *Butchers' Union Company v. Crescent City Company*, 111 U. S. 746 (762), in the course of his concurring opinion in that case 'the right to follow any of the common occupations of life is an inalienable right'."

In *Hauser v. North British, etc. Insurance Company*, 206 N. Y. 455, 100 N. E. 52, 42 L. R. A. (N.S.) 1130, a New York Statute required that insurance could not be written except by an agent devoting his full time to the insurance business, or persons engaged in the real estate business. Hauser was a lawyer, and wrote two policies of insurance. The Insurance Company refused to pay his commissions, invoking the provisions of the State as the basis of refusing to pay. The Supreme Court of New

York field the Statute unconstitutional, saying that the conditions prescribed for the issuance of a license to an insurance agent was a purely arbitrary restriction, with no good reason and no public interest conceivably to be subserved by the prohibition from conducting a business of insurance agent "with any other lawful business, or occupation in which they may be engaged." The case is so strongly in point and the analogy so close we feel warranted in quoting at length.

"As it was intimated below, following the suggestion in *People v. Ringe*, 197 N. Y. 143, 27 L. R. A. (N.S.) 528, 18 Ann. Cas. 474, the legislation now in question, must have been promoted in the interest of those engaged in the insurance brokerage business, alone, or in connection with a real estate brokerage business, rather than with any view of the public welfare. And see *People v. Gillson*, 109 N. Y. 389, at page 399, 17 N. E. 343, 4 Am. St. Rep. 465. Why should those who wish to engage in the business of soliciting and placing insurance not be permitted to conduct it as incidental to, or in connection with, any other innocent occupation, except that of real estate brokers? Where the Legislature may prohibit a business, or an occupation, it may prescribe conditions upon which it may be conducted; but, if the business, or occupation, be useful to the citizen, and it be lawful, the Constitution, both of the state and of the nation, guarantees to him the right to pursue it freely, and any arbitrary restriction upon its pursuit should be condemned as an invasion of guaranty. In varying language, but with the same thought, in very many cases, this Court has pointed out that the constitutionality of an act is to be tested by its effect upon the citizen's right freely to pursue lawful occupations; that a statute under the guise of an exercise of the police power cannot arbitrarily interfere with that liberty of pursuit; that the equal protection of the laws means equality of opportunity to all in like circumstances; and

that classification to be valid must not be arbitrary and discriminate against persons without a basis in reason. These principles have become familiar from frequent statement in the decisions and need no citation, nor discussion, of the cases here. They have become constituent elements in our popular form of government. The very nature of our free government forbids that a man should be compelled to refrain from acts which the laws permit.

"The statute before us goes far beyond what is proper regulation and is prohibitory, in preventing a person from pursuing the occupation of an insurance broker, except as his principal business, or as an adjunct to a real estate business. To use the language in the case of *Wynehamer v. People*, 13 N. Y. at page 399, this statute 'passes the utmost limit of regulation, and does not even wear a disguise.' The restriction is not in the public interests; it is obviously in the interests of the class, either of insurance, or of real estate brokers. The insurance underwriters are not forbidden to transact their business through brokers; they are required to limit it to the class of brokers authorized by the statute. The plaintiff is a lawyer, and presumably the nature of that occupation should well qualify him to make insurance contracts, and there are many mercantile occupations, which certainly cannot be deemed to affect the person's fitness to solicit, or to place, insurance. But this statute would prevent them from adding to their earnings by pursuing that occupation. To concede the validity of this statute would be to concede a power to the Legislature in the guise of a regulation to destroy a lawful business. This plaintiff had built up a brokerage business, in connection with his other occupation—as many, presumably, others have done, holding, similarly, fire exchange brokers' certificates. But, under this statute, he is compelled to refrain from it, unless pursued under conditions which involve the sacrifice of that other occupation. Arbitrarily, the statute interferes with

a citizen's business pursuits and, by an unreasonable discrimination, deprives him of that equal opportunity, which the Constitution guarantees to him. What is there in the calling of an insurance agent, or broker, which demands any especial training or knowledge, not readily to be acquired by any business man? That he should be qualified by antecedents and in character for engaging in an occupation calling for some degree of trustworthiness may be true; as it is, also, true that the nature of this occupation, differing from other mercantile pursuits, calls for an acquaintance with certain rules by which it is governed. But trustworthiness is the common property of men, and success in placing insurance will depend upon the industry, honesty, and competency, which the broker displays."

Why does this Act proscribe undertakers and their employees and limit the plaintiff insurance company? The answer is plain and not to be disguised or dissembled. The legislation was designed to eliminate the competition of the plaintiff Life Insurance Company with the other life insurance companies doing business in this State, and writing the same class of insurance, who are using the mortality tables of 1868 as a basis for their premium rates, and who refuse to write above age 65, and who have failed to adopt the beneficial recommendations of the Guertin Survey; and to the end that they may maintain their antiquated actuarial methods, and escape being coerced by legitimate competition into adopting the recommendations of the Guertin Report, which are so vastly more favorable to the policyholders. The language of the New York Supreme Court in *People v. Gillson*, 17 N. E. 343 (345) says:

"Liberty in its broad sense as understood in this country means the right, not only of freedom of servitude, imprisonment, or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation. These principles

are contained and stated in the above language in various cases (citing them). It is quite clear that some or all of these fundamental and valuable rights are invaded, weakened, limited, or destroyed by the legislation under consideration. *It is evidently of that kind which has been so frequent of late,—a kind which is meant to protect some class in the community against the fair, free, and full competition of some other class; the members of the former class thinking it impossible to hold their own against such competition, and therefore, flying to the legislature to secure some enactment which will operate favorably to them, or unfavorably to their competitors in the commercial, agricultural, or producing fields.*"

As said by the Supreme Court of the United States in *Smith v. Texas*, 233 U. S. 630; 34 S. Ct. 681; 58 L. Ed. 1129 Ann. Cas. 1915-D, 420 L. R. A., 1915-D, 677, the public interest is the basis upon which regulating or classifying legislation should be bottomed, and the tests, and prohibitions and restrictions should be enacted with reference to that object, so as not to unduly interfere with private business, and, further; "the liberty of contract is, of course, not unlimited, but there is no reason or authority for the proposition that conditions may be imposed by statute which will admit some who are competent, and exclude others who are equally competent to labor on terms mutually satisfactory to employer and employee."

The Statute assailed here "excludes others who are equally competent," and who have been adjudged to be equally competent and trustworthy by the State Agency clothed with the power and duty to so determine.

In *Northwestern National Insurance Company of Milwaukee v. Fishback; Insurance Commissioner of Washington*, 130 Wash. 490; 228 Pac. 516, 36 A. L. R., 1507, a Washington Statute which undertook to limit the number of agents an insurance company might appoint in any

particular locality on the basis of the population of the locality, was held unconstitutional. The Court said:

"At the outset, it is to be remembered that the occupation of insurance agent is a lawful business, and not one which it is within the power of the State to prohibit, and as is conceded by respondent's attorneys any individual has an inherent right to follow an ordinary lawful calling, and the deprivation of that right would be the taking of property without due process, and that the right to contract for one's services in a lawful calling is a right guaranteed by the Constitution."

After remarking that the insurance business is affected with a public interest and subject to regulation in the pubilc interest as are the professions or businesses of practicing medicine, dentistry, and law, and other activities, and that these various professions and commercial activities can be made subject to regulatory legislation in the public interest "*but, that such regulation must of course be reasonable,*" and that the right of an individual to engage in a lawful business cannot be prohibited unless that prohibition is based upon some condition which the Court finds to interfere with public morals, health, safety or welfare, the Court said further:

"The right to regulate the insurance business was sustained as to those matters which affect the general public, and the general public is not concerned with the number of agents which the insurance company may employ."

The Court said further that the Act "is in effect nothing more than the creation of a favored class who are permitted to engage in the lawful business of acting as insurance agents to the exclusion of everyone else from that business, and this excludes a great number of persons, who from time immemorial have acted as insurance agents. We all know that real estate agents, lawyers, and persons following many other lines of business, have been accustomed to write insurance as a 'sideline.' We cannot but feel that

the legislature had in view no welfare of the public, but that this legislation is an attempt to monopolize the business of writing insurance. Authorities might be multiplied until the perusal of them would become exhausting, to the effect that in any of these matters where the Legislature is interfering with lawful business that the interference must have some fundamentally sound reason back of it. No such has been suggested in support of this legislation. The Act itself, unlike most Acts in later years attempting to prescribe restrictions on human endeavor, contains no statement of its high and lofty purpose, and it is left to conjecture and the limited field of judicial knowledge to create some theory upon which can be predicated the reasonableness of this Statute. It is, as we have already said, not a statute which has anything to do with the regulation of the insurance business so that the insured may not be imposed upon, and shall at all times receive fair and equitable treatment; it is merely an interference with what has always been one of the ordinary businesses engaged in by whoever saw fit to do so; it prescribes no mental or moral qualification, establishes no standard of conduct or experience, leaves the selection of agents entirely within the discretion of the Insurance Company, and does nothing in the way of promoting public welfare, but does afford a splendid opportunity for the private gain of a few."

II.

The Act is invalid because the overwhelming proof shows that the Family Security Life Insurance Co. and its plan are affording to the low-income and working classes social and economic benefits not available from any other company,—lower premiums, based on the 1941 Standard Industrial Mortality Table, as opposed to the American Experience Mortality Table, unrevised since 1870 and used by its competitors, better surrender and extended insurance value, higher reserves and guaranteed interest

rate, all approved by the South Carolina Insurance Commissioner in February, 1948.

In *Louis K. Liggett & Company v. Baldridge*, 278 U. S. 105; 49 S. Ct. 57; 73 L. Ed. 204, a Pennsylvania Statute requiring every pharmacy or drug store to be owned by a licensed pharmacist, and forbidding any corporation, association, or partnership to own a pharmacy or drug store unless all the partners or members were licensed pharmacists, with certain exceptions as to existing corporations owning pharmacies, was under attack as unconstitutional. The Supreme Court of the United States said (Page 111 of 278 U. S., and Page 59 of 49 S. Ct.):

"The Act is sought to be sustained specifically upon the ground that it is reasonably calculated to promote the public health; and the determination we are called upon to make is whether the Act has a real and substantial relation to that end, or is a clear and arbitrary invasion of appellant's property rights guaranteed by the Constitution (citing cases). The police power may be exerted in the form of State legislation where otherwise the effect may be to invade rights guaranteed by the Fourteenth Amendment, only when such legislation bears a real and substantial relation to the public health, safety, morals, or some other phase of the general welfare. Here the question is: What is the effect of mere ownership of a drug store in respect of the public health?"

After reciting the regulatory legislation of Pennsylvania protecting the public health in relation to the compounding and sale of prescriptions and medicines, the Court pointed out: "Thus, it would seem every point at which the public health is likely to be injuriously affected by the act of the owner in buying, compounding, or selling drugs and medicines is amply safeguarded. The Act under review . . . deals in terms only with ownership. It plainly forbids the exercise of an ordinary property right, and on its face denies what the Constitution guarantees. A State cannot, under

the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations, or impose unreasonable and unnecessary restrictions upon them (citing cases)."

As this Court said in *Adams v. Tanner*, 244 U. S. 590; 61 L. Ed. 1336; 37 S. Ct. 662:

"Because abuses may and probably do grow up in connection with this business (employment agencies) is adequate reason for hedging it about by proper regulation. But this is not enough to justify destruction of one's right to follow a distinctly useful calling in an upright way. Certainly there is no profession, probably no business, which does not offer peculiar opportunity for reprehensible practices; and as to every one of them, no doubt, some can be found quite ready earnestly to maintain that its suppression would be in the public interest. Skillfully directed agitation might also bring about apparent condemnation of any one of them by the public. Happily for all, the fundamental guarantees of the Constitution cannot be freely submerged if and whenever some obstensible justification is advanced and the police power invoked."

And, further, on page 596 of the U. S. Report:

"It is also true that the police power of the state is not unlimited and is subject to judicial review, and when exerted in an arbitrary or oppressive manner, such laws may be annulled as violative of rights protected by the Constitution."

This Act undertakes to restrict lawful occupations and lawful business. The restriction must be supported by some manifest or reasonably discernible evil to be corrected or benefit to be achieved.

Legislative bodies frequently preface such Acts with a more or less sincere recital of facts imagined or claimed to exist which will justify what they intend to do. This

Act has no preamble, and the hearings before the Committees of the Legislature suggest no evil to be corrected and no benefit to be promoted by the legislation. We are not questioning the principle that this Court will not look to legislative motives to determine the validity of an Act.

But we do assert that no preamble advises the Court of any claimed or imagined facts from which evil may be inferred, and no evil to be corrected can be deduced from the terms of the Act; and nobody advocating its adoption could point out an evil to be curbed or a benefit to be promoted,—only a benefit that competing insurance companies didn't wish to be compelled to join with the Family Security in furnishing to the working classes.

In *U. S. v. Carolene Products Co.*, 304 U. S. 144; 82 L. Ed. 1234, it is shown that regulatory legislation affecting lawful business or lawful occupation, where the evil to be corrected or the benefit to be achieved lies without the realm of judicial notice and, where the facts made known or generally assumed show the regulation is not rested upon some rational basis, it must be stricken.

III.

The South Carolina Insurance Code of 1942 provides plenary regulation of the insurance companies, insurance business and insurance agents, and confers plenary power and imposes the mandatory duty upon the Insurance Commissioner, his deputies and examiners, to correct and prevent *all* abuses, unfair methods and unfair or deceptive practices. It forbids payment or settlement of insurance policies in goods or services. (Section 65, 45 Stat. 350.) The Act assailed accomplishes no further regulation and no prevention of any suggested or imagined evil, abuse or unfair method or practice. It destroys the Family Security Life Insurance Co. and disables undertakers to be officers of insurance companies and disables them, their agents and employees to be life insurance agents, though

adjudged by proper authority to be "competent and trustworthy."

That law is all that is needed to keep insurance and insurance companies and insurance agents hedged about against abuses or bad practices. Law may condemn, but law alone cannot prevent crime. Fraud, deceit, unfairness are all generic terms defying any limiting definition, because their potentialities can be measured only by the inventiveness and ingenuity of those inclined to swindle and cheat. It cannot save a deliberately discriminating and destroying legislative classification to sandwich between its destructive provisions some lofty denunciation of something not aimed at and not pretended to exist. And something that already as fully guarded against by existing law.

IV.

Discussion of the theory of appellants and the dissenting opinion below.

With great respect and some diffidence, but earnestly, we find some fault with the theory of Appellants, and the dissenting opinion below, and we call attention to some significant omissions of the Appellants to give the Court the benefit of the evidence and opinions of the most qualified and experienced to express an opinion or to give evidence that the Act is needed, or accomplishes any desirable result.

The hearing was in Columbia, the Capital city of South Carolina, and the official residence of the Insurance Commissioner and his Actuaries and deputies. Can there be impropriety in wondering and asking why Appellants didn't call the Insurance Commissioner and his experts to point out to the Court wherein there was need for this Act and wherein it could benefit or protect the public interest? May we not assume from this omission, and properly assert here, that the presumption arises from the unexplained failure to call an available witness who ought

to know, that his testimony would have been unfavorable? *Robinson v. Duke Power Co.*, (1948) 213 S. C., 185, 48 S. E. (2nd) 808.

Our policies provide for payment in money only, just like the policies of our competitors, and with a facility of payment clause, just like the facility of payment clause of our competitors.

How can it be argued from this that policies written by Family Security Life Insurance Co. and its method of writing will tempt an undertaker to persuade the consumption of the proceeds in burial expenses? The Court judicially knows that where there is doubt of the ability to pay funeral expenses, the undertaker will find out how much insurance there is and with whom it is carried. And that they keep pads of assignment forms for use in having policies assigned to them. The temptation would be the same if the insurance is written through a competing company.

Opposed to the imagined evil result mentioned in the dissenting opinion, we suggest that the same cupidity which puts the undertaker under the strain of the temptation to persuade overspending would as readily impel him to do what he could to prevent lapses. And, under the Family Security plan, the undertaker would know who was carrying insurance and could help them to avoid lapses and "*prevent the apparently enormous profits accruing to insurance companies from the so-called 'gain from mortality,'*" deplored in the Guertin Report.

Moreover, these "*apparently enormous profits from so-called 'gain from mortality'*" will not be reflected in the earnings of the Family Security Life Insurance Co. because it has adopted the 1941 Standard Industrial Mortality Table, which reflects the gain in mortality from improved living conditions, advances in medical science, magic drugs and miracle rehabilitations. And it writes through age 74. Its competitors seek to retain "the enormous profits from

gain in mortality" and the American Experience Mortality Table, unrevised since 1870.

Since undertakers and their agents and employees have been adjudged by the proper South Carolina authorities "competent and trustworthy," and since the Court will take judicial notice that there are no patent factors which necessarily condemn them to excess cupidity, as contrasted with other folks, may we not assume that, when writing a policy intended to cover burial expenses, the undertaker agent can helpfully advise the insured, who will determine the amount he wants expended on his funeral without the immediate prospect of death, and calmly, without any more emotional stress than he would experience if taking the insurance from the debit walker of a competing company? He fixes the amount, and he takes the insurance to protect his family against the sudden demands for burial expenditures "when every penny has to be counted . . . when there is a still unsettled balance at the grocers for food during the last shutdown, with rumors of dull times and another shutdown." If there is temptation, it is not diminished by the Act assailed.

The Court will take judicial notice that all insurance companies employ a policy jacket containing advertising matter and designed to provoke favorable public attention, such as "A Mutual Company owned by its policyholders," and "A Home-owned Company," and many others. The Insurance Commissioner has found no fault, and it is necessary to designate the place where premiums are to be paid. If this designation is an evil, the Act assailed does not interfere with it. Because, competing insurance companies may (and probably will) seek the advertising advantage accruing to opening an agency office in a mortuary or undertaking establishment and having its premiums paid there, and so advertising on the back.

Our Company has no copyright on its plan. It establishes no exclusive agency in any community, but wel-

comes all undertakers as agents and stockholders. However, any other mortuary or undertaking establishment may organize its own company and have its own agents, and afford the public the benefit of further competion.

Our policies are payable in cash, and the family of the insured has free choice in selecting an undertaker.

The dissenting opinion, after saying that the plan means confining undertaking to agents of the Family Security Life Insurance Co., later says: "*If these plaintiffs are successful and if the company writes many policies, as it seems to have done, other companies will undoubtedly be attracted to the field.*"

The statement seems contradictory, but if the latter be true (and we think it is), will not the public be further benefited by legitimate competition?

The criticism of the 15% commissions, contained in the dissenting opinion, is evidently based upon a misapprehension of what the 15% is. It is a *collection* commission, not the agent's commission for writing the insurance. It defrays the office expenses of the undertaker-agent in connection with the life insurance written.

The dissenting opinion and the theory of appellants' argument reached their conclusion of validity by invoking two inadmissible and illegal presumptions,—(1) that the Family Security Life Insurance Co. and its officers and agents intend to violate the criminal law, and (2) that the Insurance Commissioner and his deputies and examiners will not perform their official duties under the insurance law.

"There is a presumption in favor of legality and compliance with the law and against illegality; conversely, there is no presumption in favor of illegality, or violation of statute." 31 C. J. S. Title "Evidence," Sect. 134, page 769.

"The presumption is in favor of an intent to obey the law, and against any intent to violate it, and there is no

presumption of intent to violate the law." *Ibid.* See also 20 Am. Jur. Title "Evidence," Sect. 226, page 221.

The law presumes in favor of good faith, honesty and fair dealing, and that people intend to do right rather than wrong." *Ibid*, Section 229.

"The presumptions that public officers discharge the duties of the office and that in the discharge of such duties observe all the necessary and proper formalities imposed by law are applicable to all federal, state, county and municipal officers of high or low rank." Am. Jur. Vol. 20, Title "Evidence," Sections 170, 173.

CONCLUSION

The plan of the Family Security Life Insurance Co. is a natural and logical evolution, in step with such organizations as the Blue Cross or Group Health Insurance, so bitterly opposed by the American Medical Association (*Am. Med. Asso. v. U. S.*, 317 U. S. 519; 87 L. Ed. 434). Mr. Orgain's statements before the Senate Banking and Insurance Committee that the insurance agents had organized to be as nearly like the American Medical Association as they could get seems borne out by their similar assault on the Family Security Life Insurance Co. and the way it supplies a deep felt and widespread need of the low-income and wage-earning classes. It is in step with the program for social and economic improvement, as it has been developing and is being promoted through National legislation and imitative State Acts.

That it is in tune with this social advance is demonstrated by its phenominal growth between late February, 1948, when it had $500,00 of insurance in force, to May 8, 1948, when it had 2,824 policies representing $838,375,00 in insurance. And this during a time when the agents of other insurance companies were giving it a "bad mouth" and advocating the proscriptive Act here assailed; in the face of the adoption of the Act and in the face of this litigation.

The experimental period disclosing this economic and social progress is less than two months. We wish we might tell the Court the experience history of this company up to this date.

The people, by their action, have declared the public interest and that the assailed Act seeks to defeat it.

This company meets, honestly, economically and safely, under the strict surveillance and supervision of the Insurance Department of South Carolina, the deep craving of people financially insecure to be assured that they will be decently buried when they die. It has none of the weakness and lends itself to none of the abuses of burial societies, but, as Mr. Orgain, the mouthpiece of its organized competitors confesses before the Senate Committee: *I will tell you again as I have told them over there, and as I have admitted before every group that I have spoken to, that they have a life insurance company that is organized under the state law and has met every law that is on the books and that they are running on the Commissioner's standard of arriving at rates.*" (R. 128, 129.)

It stands admitted that its policies comply with every law; that they are enforcable contracts; that they are payable in cash; and that they are more favorable to the insured than any other industrial life policy available from competitors of the Family Security Life Insurance Co., and that it meets a public need wide-spread among the working people.

Shall an invalid Act be permitted to snatch this benefit from them?

Respectfully submitted,

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